IN THE

United States Circuit Court of Appeals

FOR THE NINTH JUDICIAL CIRCUIT

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff in Error,
vs.
J. A. MOORE, *Defendant in Error.*

No. 1323

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

Brief of Defendant in Error

L. C. GILMAN AND
M. M. LYTER,
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Brief of Defendant in Error

MOTION TO STRIKE BILL OF EXCEPTIONS AND OBJECTION TO CONSIDERATION OF ERRORS ASSIGNED.

Comes now the defendant in error, J. A. Moore, and hereby moves the court to strike from the record herein the so-called bill of exceptions in this cause, appearing in the printed record from pages 34 to 161, inclusive, and objects to the consideration by the court of the alleged errors assigned herein thereon by the plaintiff in error, for that:

I.

The so-called bill of exceptions in the record herein does not constitute a proper, sufficient or legal bill of exceptions, and the record herein contains no proper, sufficient or legal bill of exceptions.

II.

No proper, sufficient or legal assignment of errors was filed in the Circuit Court of the United States for the Western District of Washington, Northern Division, and no proper, legal or sufficient assignment of errors appears in the record herein.

III.

The exceptions appearing in said so-called bill of exceptions to the instructions given and refused by the court appear to have been taken *in solido,* and not specifically to separate and distinct propositions of law involved in said instructions.

This motion and this objection are based upon the record herein on file in this court.

L. C. Gilman and
M. M. Lyter,
Attorneys for Defendant in Error.

ARGUMENT ON MOTION AND OBJECTION.

The so-called bill of exceptions (Record, pp. 34-161, inclusive) is so utterly defective and insufficient in form that no error can be predicated upon any of the so-called exceptions therein set forth. It opens with the statement that the case came on for trial; then follows a statement that certain witnesses were called and sworn, with a transcript of portions of the testimony reduced to narrative form; the objections by counsel to the admission of evidence, the rulings of the court thereon and exceptions taken by counsel thereto, all interningled with colloquies between counsel and between respective counsel and the court; a transcript *in full* of the charge of the court, followed by exceptions taken by counsel for the plaintiff in error to different portions of the court's charge, and to the refusal of the court to give certain requested instructions, these exceptions being entirely disconnected from the portions of the charge excepted to. This document is not a bill of exceptions. It is nothing more nor less than a reduction into narrative form of the stenographer's notes—a history of what occurred at the trial—; it is without the orderly and systematic arrangement necessary in a proper and sufficient bill of exceptions. None of the exceptions taken to instructions or refusals to instruct are pointed by any evidence showing the applicability of such instructions. Should the court under-

take to consider any particular assignment of error made upon an instruction or refusal to instruct, and to determine whether any instruction given was improperly given, or instruction refused was improperly refused, it will find nothing in the assignment itself or in the exception upon which it is based as a guide from which the court can say whether the particular instruction given or refused was in any way germane to the evidence before the jury. In order to reach a determination as to the correctness of the action of the lower court upon any question raised by an instruction or refusal to instruct, this court would be compelled for itself to search through the entire record for that particular evidence to which the instruction under consideration is applicable. In short, the court would be compelled to construct for itself a bill of exceptions from the incoherent mass of matter that is dumped into the record and termed a "Bill of Exceptions." Counsel cannot in the preparation of a brief, or the court in the consideration of the case and preparation of an opinion, have before it as one complete whole any particular individual assignment of error. Should this court attempt to give consideration to any assignment of error based upon an instruction given, it would be compelled:

1st. To examine the exception in one part of the record;

2d. To then search the charge of the court set forth at full in another part of the record to ascertain whether or not this particular instruction was given; and

3d. To then examine the entire evidence to see whether or not there was any evidence rendering such instruction applicable.

The courts, wherever the practice of preserving error by means of bills of exception prevails, have condemned and refused to consider documents of this character as constituting proper bills of exception, and this court has condemned and refused to consider a bill of exception identical in form with the one now under consideration.

Frank Waterhouse, Ltd., v. Rock Island Alaska Mining Co., 38 C. C. A. 281; 97 Federal, 466-471.

In this case Judge Morrow, speaking for the court, says:

"The appellee has interposed a motion to strike from the record the document purporting to be a bill of exceptions, appearing therein, on the ground that it does not constitute a proper, sufficient, or legal bill of exceptions. The appellee also objects to the consideration by the court of the alleged errors assigned by the appellant, on the ground that no proper, sufficient, or legal assignment of errors was filed in the circuit court, and no proper, legal, or sufficient assignment of errors appears in the record. The bill of exceptions covers 156 pages of the printed record. It contains the usual formal introductory matter, and then follows a transcript of the testimony of witnesses in narrative form, with the objections by counsel to the admission of testimony, and the rulings of the court with respect to such objections; a report in full of the charge of the court to the jury; the exceptions taken by

counsel to certain portions of the charge, and to the refusal of the court to give certain instructions requested; and the exhibits in the case, including, also, the proceedings on a motion for a new trial. The certificate of the trial judge to this bill of exceptions recites that in 'order that all the motions, offers, rulings, exceptions, and other proceedings had, and all the testimony, exhibits, and other evidence adduced, received, or offered, in said cause, and not already a part of the record, may be by this bill of exceptions made a part of the record therein,' the judge has set his hand and seal to the same, and certifies that the bill of exceptions, together with the sundry exhibits therein mentioned, 'contains all the motions, offers, rulings, exceptions, and other proceedings had, and all the material testimony, exhibits, and other evidence adduced, received, or offered, in said cause, from the beginning of said cause down to the date of this certificate, and contains all the material facts, matters, and proceedings in said cause not already a part of the record therein, including the charge of said judge to said jury in full.' The record thus made up appears to be a report of the trial of the case in such fullness of detail as to incumber the record with much useless matter, and impose upon this court the difficult task of determining the precise relation of scattered testimony to the principles of law declared by the court in the instructions given to the jury, and to the propositions of law contended for by counsel, and rejected by the circuit court in the instructions refused. This method of presenting a case to the appellate court has been repeatedly condemned by the supreme court of the United States."

The Supreme Court in the case of *Hanna v. Maas*, 122 U. S. 24, discussing a bill of exceptions of this character, says:

"The bill of exceptions, instead of stating distinctly, as required by law and by the Fourth Rule of this court, those matters of law in the charge which are excepted to, and those only, does not contain any part of the charge,

or any exception to it, and undertakes to supply the want by referring to exhibits annexed, containing all the evidence introduced at the trial, the whole charge to the jury, and notes of a desultory conversation which followed between the judge and the counsel on both sides, leaving it to this court to pick out from those notes, if possible, a sufficient statement of some ruling in matter of law.

"But to assume to do that would be to take upon ourselves the duty of drawing up a proper bill of exceptions, a duty which belonged to the excepting party, and should have been performed before suing out the writ of error. This we are not authorized to do. Our duty and authority are limited to determining the validity of exceptions duly framed and presented.

"The defendants having failed to reduce their exceptions to such a form that this court can pass upon them, the judgment must be affirmed."

See also

City v. Baer, 13 C. C. A. 572; 66 Federal 440-445;

Phosphate Co. v. Cummer, 9 C. C. A. 279; 60 Federal 873;

Improvement Co. v. Frari, 7 C. C. A. 149; 58 Federal 171;

Scaife v. Land Co., 30 C. C. A. 661; 87 Federal 308-310;

The Francis Wright, 105 U. S. 381;

Lincoln v. Claflin, 7 Wallace 132;

Railroad Co. v. Fitzgerald (D. C. App.) 22 Washington Law Reports 217;

Railroad Co. v. Walker, Id., 223.

In *City v. Baer, supra,* the Circuit Court of Appeals of the Fifth Circuit says:

"It" (the bill of exceptions) "purports to embrace all of the testimony submitted by the parties. It all appears to be set out in the order of its introduction, without any special local relation to any of the exceptions on which the eighty-seven assignments of error claim to repose. We will not tax our time and the patience of the reader by repeating the reasoning we have heretofore delivered on this subject. * * * The document referred to cannot be taken as a bill of exceptions."

In *Railroad Co. v. Fitzgerald, supra,* the Supreme Court of the District of Columbia says:

"The court will not regard itself under any obligation to search through a mass of testimony inserted in a bill of exceptions, with a large amount of irrelevant matter and formal statements, to ascertain what there is that bears upon some specified ruling of the trial judge."

The various exceptions relied upon by plaintiff in error are all embraced in one document termed a bill of exceptions, and while this may be proper, we submit that each exception really constitutes a bill by itself, and must stand alone and be considered upon the matter and that only contained in itself. Proper matter outside of the exception itself might be made a part of it by reference, but the court is not bound to look beyond what is incorporated in the exception, either directly or by proper reference, to determine whether or not it is well taken; and it has been established by repeated rulings of the Federal Courts that every bill of exceptions must be considered as presenting a distinct and substantial case, and it is on the evidence stated in itself alone that

the court is to decide; and when exception is taken to instructions of the court given or refused, such exceptions must be accompanied by a distinct statement of the testimony given or offered which raises the question to which the exception applies.

Insurance Co. v. Raddin, 120 U. S. 183-195;
Jones v. Buckell, 104 U. S. 554-556;
Worthington v. Mason, 101 U. S. 149;
Dunlop v. Munroe, 7 Cranch 242;
Scaife v. Land Co., supra.

Applying the principle of these cases to the alleged bill of exceptions before the court, it is apparent that no one of the exceptions based upon the instructions given or instructions refused can be considered by the court, as there is no evidence incorporated in the exception itself, either directly or by proper reference from which the court can determine whether the instruction complained of was proper to be given or refused, and the court can only determine the propriety of the instruction by itself examining the entire mass of testimony included in the bill of exceptions in the order of its introduction and covering, including exhibits, upwards of one hundred pages of the printed record, and segregating therefrom the evidence, if any, applicable to any particular instruction. And the same is true as to exceptions to the admission or exclusion of evidence. There is no attempt

in the bill of exceptions to segregate and place by itself in an orderly manner the evidence to which any such exception is applicable. The objections to evidence and exceptions taken to the admission or exclusion thereof are flung into the record in the same order that they occurred, and in the words that fell from the lips of counsel at the time of the trial. We submit that the only proper method of presenting exceptions to this court is by properly segregating the matter pertinent to any exception from all other matter in the record, so that this exception standing alone would, if it were the only question presented, constitute a complete bill of exceptions, and that this court should not encourage the practice of putting into the record for a bill of exceptions the stenographer's notes of the trial. Since the case of *Frank Waterhouse, Ltd., v. Rock Island Alaska Mining Co., supra,* was decided by this court, counsel practicing therein has had notice of what would be required by this court in a bill of exceptions, in order to properly present a case for review, and there is no excuse for counsel or parties disregarding the plain mandate of the court.

II.

The assignments of error based upon instructions given and instructions refused, being assignments 7 to 15, inclusive, are as defective as the bill of exceptions in the particulars above enumerated. (Record, pp. 171-178.)

These assignments are based upon instructions given and instructions refused; each contains a verbatim copy of the instruction given or the instruction refused, and nothing more. None of them quote any portion of the testimony or make any reference thereto. The sufficiency of such assignments has been twice before the Circuit Court of Appeals for the Fourth Circuit, and in each case that court has refused to consider errors so assigned.

Newman v. Steel & Iron Co., 25 C. C. A. 382; 80 Federal 228-234;

Surety Co. v. Schwerin, 26 C. C. A. 45; 80 Federal 638;

In the first case above cited the court says:

"So far as the assignments relate to instructions asked for and refused, they neither quote nor refer to the evidence that shows the relevancy of the propositions of law propounded by such instructions, and therefore we presume that no such testimony was before the jury, in which event it is evident that the court below did not err in refusing to give them."

In the latter case the court says:

"We are unable to consider the point suggested by counsel for the plaintiff in error concerning the refusal of the court below to give the instructions asked for by the defendant, for the reason that the evidence, if any there was, showing the relevancy of the propositions of law propounded thereby, is neither quoted in full nor its substance referred to in the assignments of error."

A reference to the assignments of error made in the case at bar upon instructions given and instructions re-

fused (Assignments 7 to 15, inclusive; Record, pp. 171-178) discloses that in no one of the assignments, based as all of said assignments are, upon instructions given and refused, is contained any allusion to the evidence, and the court will therefore presume that, as to instructions given, the court had the evidence before it, making such instructions proper, and as to instructions refused that there was no evidence upon which the court could base the instructions asked for.

In this connection attention is called to the fact that the rules of the Circuit Court of Appeals for the Fourth Circuit relative to bills of exceptions and assignments of error are identical with those of this court. (See Compiled Rules Circuit Court of Appeals, 78 Federal, pages XXXI, et seq.; Rules Fourth Circuit, 78 Federal p. LVI; Rules Ninth Circuit, 78 Federal, p. CII.)

III.

Under elementary principles of law, this court cannot consider Assignments of Error 7, 8, 9, 10, 12, 13, 14 and 15. These assignments are based upon instructions given at the request of the defendant, and the refusal to give instructions requested by the plaintiff. No proper exception was taken to the giving of the instructions asked by the defendant, or the failure to give those asked by the plaintiff, but the plaintiff took one general

exception to the action of the court in giving one set of instructions and refusing the other. We refer to the record to show the manner in which these portions of the charge were excepted to (Bill of Exceptions, Record pp. 158-159), wherein appears the following:

"The plaintiff * * * excepted to the refusal of the court to give to the jury the instruction requested by plaintiff in writing before the beginning of the argument to the jury, numbered 1, 5, 6, 7, 8, 9, and 10, and to the giving of the first, second, third, fourth, fifth, sixth and seventh instructions as requested by the defendant."

It will be seen that the plaintiff, instead of pointing out specifically to the court, by an exception, each particular instruction in which it was claimed that the court had committed error, lumped in one exception his objections to fourteen different instructions, involving as many propositions of law. Such an exception will not, nor will assignments of error based thereon, be considered by the court.

Ry. Co. v. Prunty, —— C. C. A. ——; 133 Federal 13;

Hindman v. Bank, 50 C. C. A. 623; 112 Federal 931;

Anthony v. Ry. Co., 132 U. S. 172.

Allis v. U. S., 155 U. S. 118;

Thiede v. Utah, 159 U. S. 520.

In *Ry. Co. v. Prunty, supra,* the court, in discussing an assignment of error based upon an exception to an

instruction which contained two propositions of law, says:

"This excerpt from the charge is excepted to and assigned as a whole as error, without specifying the part of it to which objection is made. The last paragraph of the charge is simply to the effect that a contention of the railway company, which there is no evidence to support, need not be considered by the jury. This is so clearly correct that we need not further comment on it. This, in fact, disposes of the whole assignment, for an objection to an entire charge, consisting of several propositions, some of which are right, should not be sustained, even if the charge contained errors not specifically pointed out."

In *Hindman v. Bank, supra,* there were forty-one errors assigned upon the charge of the court. These errors were based upon eight exceptions taken to the charge. In discussing this case, the court says:

"Objection is made that these exceptions are too general; that each is an exception covering several distinct propositions; and that, if any proposition be good, the whole exception must fail. * * * An exception to a charge should be taken before the jury retire. It should be sufficiently definite to call the judge's attention to the particular matter objected to, in order that he may have an opportunity to correct it. *Neither should an exception cover two distinct propositions, for such an exception is insufficient if either one should prove correct.*"

In *Allis v. U. S., supra,* the Supreme Court says:

"A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions."

Thiede v. Utah, supra, is directly in point. At the close of the case the defendant presented a body of instructions in twenty-two paragraphs, and asked the court to give them, which the court refused to do. The defendant then made one general exception to the refusal of the court to give instructions requested by the defendant numbered 1, 2, 3, 4, 5, etc., exactly as the plaintiff did in this case. The court says:

"Such an exception is insufficient to compel an examination of each separate instruction. It is enough that any one of the series is erroneous. In *Beaver v. Taylor,* 93 U. S. 46, 54 (23: 797, 798), this precise question was presented, and the court said: 'The entire series of propositions was presented as one request; and, if any one proposition was unsound, an exception to a refusal to charge the series cannot be maintained.' "

We do not think that counsel for the plaintiff in error will contend that all of the instructions asked for by him, and refused, correctly stated the law, and that all the instructions asked for by the defendant, and given, were erroneous. Unless such be the case, the exception discussed in this paragraph was unavailing, and this court will not review the action of the lower court in giving or refusing to give any of the instructions mentioned.

We submit that for the reasons given our motion to strike the bill of exceptions and objection to the consideration of error assigned, should be sustained; that there is no proper record before the court enabling it to re-

view this cause; and that the judgment of the lower court should be affirmed.

Without waiving the foregoing motion and objection, but still insisting thereon, the defendant in error submits the following brief on the merits:

STATEMENT OF THE CASE.

In the latter part of the year 1892 or early in the year 1893, there came from Council Bluffs, Iowa, to Seattle, Washington, two men, George J. Crane and "Dr." F. P. Bellinger. They established at Seattle a sanitarium for the cure of those addicted to the morphine, cocaine, chloral, liquor and tobacco habits. They claimed that Bellinger possessed a secret formula, from which a medicine could be compounded, which was a specific for the habits above named.

Desiring to make money by the exploitation and sale of this so-called remedy, they for some reason selected the defendant in error for one of their victims, and through the agency of one C. G. Austin, to whom they offered to make it an object to induce Moore to invest with them (Record p. 50), they succeeded in obtaining Moore's attention and interest. They represented to him that Bellinger owned this secret formula, that it had been discovered by his father, who was a surgeon in the Ger-

man army, that it contained a certain drug which could not be procured in the United States, and for which they had to send to Germany, that there was not a chemist in the United States who could analyze or determine what this drug was, and that the formula was a sure cure for the habits mentioned. (Record pp. 51, 52.) By these representations and representations of a similar character, they finally succeeded in inducing the defendant in error to purchase a fifth interest in this formula for the sum of Five Thousand Dollars ($5,000) and to give his promissory note in that amount therefor. The sale of this fifth interest was accomplished in this way: A corporation, known as the "Bellinger German Remedy Company," was organized, and Bellinger transferred this pretended formula to the company, in consideration of all its capital stock, and Bellinger and Crane then transferred one-fifth of the capital stock to Moore, receiving therefor his note of Five Thousand Dollars ($5,000), made payable to the order of Crane, but owned in fact one-half by Crane and one-half by Bellinger. Bellinger then made a contract with the corporation whereby he agreed to compound from this formula and furnish such medicines as were required at the different sanitariums which the corporation proposed to establish. While this formula was transferred to the corporation, its contents were to be kept a secret until after Bellinger's death, but in order that it might be available after that event, Bel-

linger agreed to deposit the formula in a safe deposit box in the City of Seattle.

After these arrangements had been completed the defendant in error undertook to exploit this remedy and to sell territorial rights to the same. The business proved a complete failure. The pretended remedy was a hoax, and the company, after a short period had elapsed, became hopelessly insolvent and discontinued doing business. At about the time the company ceased doing business Austin and others, desiring to ascertain what the supposed formula contained, broke into the safe deposit box, supposed to contain the same, and found nothing there but a *piece of blank paper*. (Record p. 52.)

After the commencement of this action, the defendant in error sued out a commission and took the testimony of "Dr." Bellinger at Council Bluffs, Iowa. The question was propounded to him as to what this formula contained. He at first refused to answer, but, being ordered by the commissioner to answer, repeated the names of ten or twelve well-known drugs, without stating the proportions in which the same were to be compounded. (Record pp. 55, 56.) Well-known and skillful physicians and pharmacists, who testified on the trial, stated that this pretended formula was not a formula at all, and no compound that could be made of the different drugs mention-

ed would act as a specific for the morphine habit, or any of the habits mentioned. (Record, pp. 75 to 86.)

It is apparent that this pretended remedy was a fraud, that the representa tion made to Moore to induce him to execute the Five Thousand Dollar ($5,000) note were false and fraudulent and that the note was without consideration. We do not understand the plaintiff in error in this case to contend otherwise. In any event, a jury has so found, and their finding is sustained by ample testimony. The promissory note given by Moore, as above stated, payable to the order of George J. Crane, was by Crane endorsed to a bank in Council Bluffs, Iowa, known as the Citizens' State Bank, and placed with said bank as collateral security for an antecedent indebtedness of Crane. The bank at the time, through its cashier, had knowledge of the fraud that had been perpetrated upon Moore in obtaining this note (Record pp. 56, 57, 58), but from time to time represented to Moore that it had acquired the same before maturity, without notice, in good faith and for value. Mr. Moore, relying upon these representations and believing the same, supposed that he had no legal defense to the note, notwithstanding it was fraudulent in its inception, and, therefore, renewed it from time to time, at the request of the bank, and upon the representations mentioned. The notes sued upon are notes given in renewal of this original note, and were

assigned after maturity by said Citizens' State Bank to the plaintiff in error.

ARGUMENT.

The first and second assignments of error, which are discussed in Paragraph One of the brief of plaintiff in error, attack the sufficiency of the affirmative defenses in defendant's answer. An examination of the answer and of the authorities cited will disclose that the learned counsel for the plaintiff in error has confounded the defense of a partial want or partial failure of consideration, with the defense of fraudulent misrepresentations inducing the execution of a note, and a total want of consideration. Both *Gruinger v. Philpot* and *Packwood v. Clark* are cases of partial failure of consideration, and hold properly that failure of consideration, in order to constitute a defense, must be a total failure, and that a partial failure can only come in by way of recoupment of damages for the partial failure; but it is entirely different in the case of a defense based upon fraud and a total failure of consideration, and it is elementary that either total failure of consideration or fraud is a sufficient defense to an action on a promissory note between the original parties thereto, or an endorsee having notice of the fraud.

Mr. Daniel, at Section 193, Daniel on Negotiable Instruments, Third Edition, says:

"'Fraud cuts down everything,' is the sharp phrase of the Lord Chief Baron Pollock in an English case. And between immediate parties it at once destroys the validity of a bill or note into the consideration of which it enters. We have seen that if a horse or other personal chattel is warranted, and a bill, note or check given for the price, the breach of the warranty is no defense to the action on the bill, note or check (unless authorized by statute); but if it appear that the seller knew that there was unsoundness in the horse or other chattel, the element of fraud enters into the transaction. There was, in fact, no contract, and proof of the fraud at once defeats the action on the bill, note or check."

And in 4th American and English Encyclopaedia of Law, Second Edition, at page 193, the rule is thus stated:

"If the consideration of a bill or note is vitiated by fraud the instrument will not sustain an action brought to enforce it by the payee or other immediate party."

With reference to failure of consideration Mr. Daniel, at Section 203, of the Third Edition of his work on Negotiable Instruments, thus states the law:

"The total failure of consideration is as good a defense to a suit upon a bill or note as the original want of it, and is confined to the like parties. If the contract is rescinded, the consideration of the bill or note totally fails, and payment of it cannot be enforced. Thus, if the vendee give his bill or note for goods of a certain manufacture, growth or description, and the payee fails to deliver goods of the character contracted for, the former may rescind the contract and refuse to pay his bill or note, there being a total failure of consideration. So, where a purchaser of a patent gave his note for it, and the patent proved void, it was held that the consideration had totally failed. But proof that another patent had been issued for the same invention to another person would not show that the first was void.

"And a partial failure of the consideration is a good defense *pro tanto*. But such part as is alleged to have failed must be distinct and definite, for only a total failure, or the failure of a specific and ascertained part, can be availed of by way of defense; and if it be an unliquidated claim the defendant must resort to his cross action."

And in Volume 8 of Cyclopedia of Law and Procedure, at page 31, the rule is thus stated:

"As between original parties to a bill or note the consideration thereof may always, in the absence of an estoppel, be inquired into; and a want or failure of the same constitutes a good defense, even though the consideration be expressed therein or expressly acknowledged by the words 'value received.' "

We submit that the true rule is that fraud always constitutes a defense, as does also a total want of consideration. In case of a partial failure of consideration a defendant may be required to bring his cross action.

The third and fourth defenses set forth in the answer herein, allege not only that the execution of the note in question was induced by fraud, but that there was a total want of consideration, and are, therefore, sufficient. It is also claimed that these defenses are insufficient, because they do not allege a rescision and a restoration of, or offer to restore the consideration received. Both cases cited to this point by plaintiff in error, *Herman v. Gray* and *Bisbee v. Torrium,* are cases of partial failure of consideration. The true rule in reference to this ques-

tion is this, that where the consideration has utterly failed, and where the thing received was worthless and without value, neither rescision nor restoration is necessary.

Bishop v. Thompson, 196 Illinois 210; 63 Northeastern, 684; 26 Arkansas, 373;

Larkin v. Mullen, 128 California 449; 60 Pacific 1091;

Cheney v. Powell, 88 Georgia 628; 15 Southeastern 750;

Hengham v. Harris, 108 Indiana 246; 8 Northeastern 255;

Heso v. Young, 59 Indiana 379;

Childs v. Merrill, 63 Vermont 463; 22 Atlantic 626;

Pidcock v. Swift, 51 New Jersey Equity 405; 27 Atlantic 470.

In Page on Contracts, Section 137, the rule is stated in this way:

"The general rule that the party guilty of fraud must be placed *in statu quo* is subject to certain qualifications. If the property received by the person defrauded is worthless or if its value is trifling he need not offer to return it in order to rescind."

The allegations of the answer which is attacked by the plaintiff in error in the assignments under discussion are:

"The said stock of the said corporation is and was wholly worthless and of no value whatsoever." (Record p. 21.)

We submit that the allegations of these affirmative defenses are sufficient and Assignments of Error One and Two are, therefore, without merit.

II.

In the second paragraph of the brief of plaintiff in error there is discussed the sixth, seventh, fourteenth and sixteenth assignments of error. The sixth, seventh and sixteenth raise practically the same question, namely: The sufficiency of the evidence to justify the court permitting the case to go to the jury, but the question raised in the fourteenth assignment of error has no relation to this question, and we will, therefore, make it the subject of a separate discussion.

In limine we assert that the question whether or not there was sufficient evidence to justify the verdict, or whether the court should have directed a verdict for the plaintiff, is not before this court. In order to bring before an appellate court the question whether or not the lower court should have submitted a cause to a jury, the record must contain the entire evidence and there must be a certificate of the lower court to that effect.

Ry. Co. v. Cox, 145 United States 539-606;
Honey v. Ry. Co., 27 C. C. A. 262; 82 Federal 773;
Taylor-Craig Corporation v. Hage, 16 C. C. A. 339; 69 Federal 581;

Oswego Town v. Insurance Co., 17 C. C. A. 77; 70 Federal 225.

All the evidence adduced on the trial in the court below has not been incorporated in the record in this court, and the lower court has not certified that the record does contain all the evidence. The certificate of the court to the bill of exceptions is that the same "contains all the testimony *in substance* taken and admitted upon the trial of said cause." (Record p. 161.) This is not a certificate that the record contains *all of the evidence.*

Ry. Co. v. Washington, 1 C. C. A. 286; 49 Federal 347-353;

Yates v. George, 51 Indiana 324;

Stratton v .Kinnard, 74 Indiana 302;

Hays v. Bincenns, 82 Indiana 178.

In *Ry. Co. v. Washington, supra,* the court says:

"Whether it" (the evidence) "was sufficient to warrant a verdict on this issue for the plaintiff this court cannot say, because the '*substance*' only of the testimony is embraced in the bill of exceptions, and we would not be willing to disturb the verdict of the jury, or hold that there was not sufficient evidence to support any given issue in a cause, upon the statement contained in the bill of exceptions in this case,—that the witnesses testified in '*substance*' to what is therein stated. The opinion of the jury and of this court might differ widely from that of the parties or the court below as to what was the '*substance*' of the witnesses' testimony. The parties and the court may and should omit from the bill of exceptions all irrelevant and redundant matter; and the testimony of witnesses may be stated in a narrative form when it

was delivered in answer to questions; but what is sent up as the evidence in the case must be certified to be all the evidence, and not the '*substance*' of it, before this court can be asked to pass on the question of its sufficiency to support the verdict."

In *Yates v. George, supra,* the court says:

"In order to present a question to this court arising upon the evidence, the evidence should be set out; and it will not do to say that a witness testified in *substance* the same as another witness. The testimony of two or more witnesses might be regarded by the judge signing the bill of exceptions as substantially alike, while if the evidence were set out in the bill of exceptions, this court might think the testimony of the different witnesses substantially unlike."

And as the bill of exceptions does not purport to give all the evidence, according to well established rules, this court in such a condition of the record is bound to presume that there was testimony which justified the court in sending the case to the jury, and in refusing to give a peremptory instruction.

Russell v. Ely, 67 United States 575.

It is not correct, as claimed by the plaintiff in error, that the defendant in error relied solely upon the testimony of the witness Hannan to establish knowledge on the part of the Citizens' State Bank of the fraudulent character of the paper which Crane gave to it. It relies upon the entire evidence in the cause, which was submitted to the jury, and which is not before this court.

But we submit that we might safely rely upon the

evidence of Hannan alone. This note had been obtained by Crane and Bellinger from Moore by fraud and deceit of the grossest character. It was presented by Crane to Hannan, the cashier of the Citizens' State Bank, for transfer. Mr. Hannan himself, whose testimony was taken at the instance of the defendant, testified (Record pp. 56, 57, 58):

"I did take from George J. Crane a note signed by Mr. Moore. It was while I was cashier of the Citizens' State Bank. *I had learned from Mr. Crane of the transaction he had with Mr. Moore and he had advised me of the details of the deal* and that he had Mr. Moore's note. Mr. Crane at that time was owing us quite a sum of money, the collateral to which I did not consider of much value, and being anxious to obtain as much collateral as possible *for the note, prevailed on him to turn the note over to us, which he eventually did.*

* * * * * * * *

"There was no consideration given for the note; I simply obtained it as additional collateral and filed it along with the collateral we then had, which consisted of of lot of old insurance notes. Mr. Crane simply endorsed the note in blank and turned it over.

* * * * * * * *

"Mr. Crane had fully explained to me just what he was doing—explained what they tried to do in Denver, San Francisco and other places before they went to Seattle, and I was fully advised at all times as to what he was doing. I knew full well what the note was given for, it having been given for the recipe and privilege of using the recipe for an opium and whisky cure.

* * * * * * * *

"I state that *I knew all about the consideration for the original note.*"

This witness, who, for the purposes of this transaction, was the bank itself, states that Crane told him all about the details of his transaction with Moore. The plaintiff had every opportunity for cross-examination, and could have asked him just exactly what was said by Crane at the time, and failed to do so, thereby failing to challenge in any way this statement of the witness as to his full knowledge of the fraud. In this state of the record can it be said that this alone was not sufficient evidence upon which a jury might find that Mr. Hannan, and consequently his bank, had, not only notice, but full knowledge, of the fraudulent character of the note that was the subject of the transaction?

The learned counsel for the plaintiff in error devote pages of argument and cite numerous authorities to establish that the doctrine of the Federal Courts is that mere suspicion or knowledge of facts sufficient to put a prudent man upon inquiry does not invalidate a promissory note in the hands of one who purchases the same for value. Suppose we concede this to be the law, what can it avail plaintiff in error? The testimony of Mr. Hannan is not that he suspected that there was something wrong about the note or that he had knowledge of facts which might have put him on inquiry. On the contrary, his testimony establishes positive knowledge on his part of the original infirmity in the note. He says:

"I had *learned* from Mr. Crane of the transaction he had with Mr. Moore and he had advised me of the details of the deal" (Record p 56), and further: "*I knew* full well what the note was given for" (Record p. 57), and again: "I state that *I knew all about the consideration* for the original note" (Record p. 58).

This is not a case of suspicion on the part of the purchaser of a promissory note or knowledge of circumstances that should cause a prudent man to look further, but a case of actual, positive knowledge on the part of the purchaser, so that if Mr. Hannan is to be believed, and a jury had a right to and did believe him, his knowledge of the original transaction was as full as that of the payee of the note. We submit if there were no testimony in the case except that of Mr. Hannan, and the record does not disclose but that there was other testimony, that alone would be ample to sustain the finding of the jury on the question of knowledge of the plaintiff bank's assignor.

But it is claimed that the defendant in error is estopped from taking advantage of the fraud practiced upon him, in obtaining the original note, of which the bank had knowledge, by his act in renewing the original note, the renewal note being the one sued on in this action. If Mr. Moore, with full knowledge of the original fraud, and with full knowledge that the bank was a party to that fraud, renewed the note, he would doubtless have estopped himself from defending on the ground of fraud, but

the evidence is ample in this case for the jury to find, and they did find under the instructions of the court, that Mr. Moore not only did not have knowledge of the fraud at the time of making the original note, but that the renewal note was obtained from him by the false and fraudulent representations of the bank, to the effect that it had acquired the note for value, before maturity, without notice.

Mr. Hannan says: "I wrote Mr. Moore many letters or caused them to be written in behalf of the Citizens' State Bank of Council Bluffs, *always claiming that the bank had acquired the entire note in good faith, for value and without notice,* as the letters written by me while in the bank will show. * * I said anything and everything I could to get a little money out of the note." (Record p. 59.)

Mr. Moore testified, in response to a question as to what induced him to give the renewal note in suit:

"I was led to believe that the bank had purchased the note in good faith; that no matter what my impressions were as to the original deal, that if the bank became the possessor of them as an innocent purchaser there was no recourse for me but to pay the notes. I kept renewing the notes, expecting to do so." (Record, p. 94.)

And again: That he did not learn that the bank had knowledge of the circumstances under which he gave the note, until Mr. Hannan's deposition was read at a former trial of the case. (Record pp. 93, 94.)

Upon this evidence, and much of the same character, the court submitted to the jury the question as to whether or not the renewal of the original note was obtained from the defendant in error by the bank, through false and fraudulent representations. If the original note was void as between the parties; if the bank could not have recovered on the original note by reason of the original fraud and its knowledge thereof at the time of the note's acquisition, and it induced a renewal by making false representations to the maker, this renewal note would stand on no higher plane than the original.

Rash v. Farley, 91 Kentucky 344; 34 American State Reports 233.

In this case the original note was void, having been given in violation of a statute. The holder of the note agreed with the maker that the validity thereof should, as between themselves, be determined by the decision in an action which the holder was then prosecuting against the maker of a similar note. The holder subsequently induced the maker, by means of false representations as to the result of that action, to execute a renewal. The court held, upon his seeking to enforce the new note, that it would be treated as if he had sued on the original and if the latter was void, he would be precluded from recovery, and says:

"It is alleged substantially in the answer, and not being denied, must be taken as true, that there was an

agreement between appellants and appellee, before the note sued on was executed, that they would abide the decision of the case of appellant against Holloway, and that he, appellee, who resided in the county and was ignorant on the subject, was deceived, and induced to execute the note in renewal of the original by false information sent to him by appellant for the purpose of inducing him to execute it, which he would not have otherwise done. In such case, it seems to us, appellant must be treated as he would have been holding and asking judgment on the original note, which was made by statute void."

It certainly does not require argument or the citation of authority to establish the law to be that if the bank could not have recovered on its original note, on account of its privity with its fraudulent inception, it certainly could not put itself in a better position by obtaining a *new note* through a *new fraud*. This principle is necessarily destructive of the elaborate argument of counsel for plaintiff in error on the question of novation. Even if we concede that there was a novation and Moore was induced to participate in this novation through the fraudulent misrepresentations of the bank, the renewal note would have no better standing than the original note.

But there is nothing approaching a novation in this case, and no evidence introduced or offered that would have established a novation. As we understand the claim of plaintiff in error, it is this: That, as Moore owed Crane, and Crane owed the bank, the renewal of Moore's note through the bank and the release of Crane, constituted a novation. The transactions, all taken together,

lack so many of the essential elements of a novation that the contention seems hardly worthy of serious consideration.

First. In order to constitute a novation, the consideration moving to Moore for the execution of the renewal note, must have been an agreement on the part of the bank to release Crane. This element is entirely lacking. There was no request on the part of Moore that the bank should release Crane, and no agreement on the part of the bank to release Crane. So far as the evidence shows, the question of releasing Crane was never discussed between Moore and the bank. All the evidence on the subject shows that the inducement to Moore to execute the renewal note was the fact that, relying upon the statements of the bank's cashier, he believed the old note to have been purchased by the bank in good faith, and in the regular course of business, and supposed that the bank owned this note, that Crane was no longer a party thereto, and that the bank had a valid, subsisting claim against him, which it could enforce.

Second. A novation requires three parties. It has been the theory of the plaintiff in error throughout this case that it acquired the original note from Crane before maturity, and for a valuable consideration; that it became the owner of the obligation; that by the transfer from Crane to the bank the debt, which had theretofore been

due from Moore to Crane, became due from Moore to the bank. If the title to Moore's note had passed from Crane to the bank no novation would or could arise by the bank obtaining a renewal of the same. If it saw fit, after obtaining this renewal, to release Crane, that was a purely voluntary matter on its part. After the transfer from Crane to the bank it owed no duty to Crane, except the duty of diligence in the collection of this note as collateral and the application of the proceeds of the collection upon Crane's original indebtedness.

Third. A novation requires the meeting of three minds. There is nothing in the evidence in this case showing, or tending to show, that the minds of Moore and the bank had ever met upon the question of a shifting of obligations. While it may be true that if Moore and the bank had agreed upon a release of Crane, Crane would have had a right to come in at a later time and ratify the agreement. But the record is entirely without testimony indicating that the question of the release of Crane had ever been a subject of negotiation or consideration between Moore and the bank.

The court was, therefore, correct in giving the instruction that was the basis of the fourteenth assignment of error, and in telling the jury that there was no novation in the case, as there was nothing, either in the evidence or in the pleadings, to justify any claim of a novation.

III.

It can hardly be conceived that counsel for plaintiff in error can be serious in the discussion of his fourth assignment of error. His claim, as we understand it, is that it was error to admit oral evidence of the negotiations between Moore and Crane and Bellinger, on the ground that the negotiations had merged in a written contract. The issue was fraud. The defendant in error claimed that he had been induced to make himself a party to these writings by the fraudulent misrepresentations on the part of Crane and Bellinger, which preceded the writing. It would be strange, indeed, for a court to hold that where a contract is attacked as having been procured by fraudulent misrepresentations, the party claiming to have been defrauded cannot give evidence of the misrepresentations, but is bound by the writing itself, which is the result of the fraud.

So, also, of the claim made that the transaction was not between Moore and Bellinger, but between the corporation and Crane and Bellinger, is equally without merit. The corporation was nothing more or less than a vehicle to carry the scheme which had been laid by Crane and Bellinger to obtain Moore's money for an interest in this worthless compound.

IV.

We have previously discussed the question of novation, and it is unnecessary, in considering the fifth assignment of error, to repeat what has been said on that subject. As we have heretofore shown, the evidence offered would not have established a novation. Plaintiff in error was not entitled to prove a novation, as there was nothing in the pleadings to suggest that a novation was claimed. It was entirely outside the issues. The issues were fraud and want of consideration in obtaining the execution of the original note, actual knowledge of that fraud on the part of the endorsee bank, and fraudulent representations by the bank to induce a renewal of the note. How could it be material whether the contract of renewal was a novation or some other form of contract, provided it was induced by fraud? If the renewal was not induced by fraud, plaintiff would have had the right to recover in any event. If it was induced by fraud, it was immaterial whether the contract assumed the form of a novation or some other form.

V.

The eighth assignment of error rests upon the refusal of the court to give instructions numbered five and eight, requested by the plaintiff in error. (Record pp. 146, 147.) This assignment cannot be considered, for the reasons heretofore advanced in Paragraph III of our

argument on the motion in this brief. No proper exceptions were taken to the refusal of the court to give instructions numbered five and eight, requested by the plaintiff in error, the exception having been lumped with other exceptions. (Record pp. 158, 159). As we fully discussed this question in the brief to our motion, we will at this point do nothing further than to refer to that discussion. But the court committed no error in refusing these instructions. They are too broad. The court charged the jury correctly on the question of the necessity of reliance upon the representations made, in order to constitute a defense, telling the jury that, in order for them to find for the defendant they must find, not only that the fraudulent representations were made, but that the defendant relied upon the same in signing the note. (Record p. 152.) Plaintiff in error cannot complain because the principle of law for which he contends was not stated in the exact language he asked.

VI.

The tenth assignment of error, which is based upon the refusal of the court to give the seventh and ninth requests asked by the plaintiff in error (Record p. 147), falls in the same category as the assignment last discussed. No proper exception was taken to the refusal of the court to give these instructions. Besides, the court charged the jury fully and correctly upon the question

involved in these requests, telling the jury specifically that, in order for them to find for the defendant, they must find that the representations made were false and fraudulent and known so to be by Crane and Bellinger. (Record pp. 152, 153.)

VII.

Eleventh assignment of error. The instruction complained of in this assignment was not excepted to by the plaintiff in error, except in so far as it states that the knowledge of Hannan, or any information which he might have which would put a prudent man upon inquiry, was to be imputed to the bank. (Record p. 159.) It was an undisputed fact in the case that Hannan, as cashier of the Citizens' State Bank, acted for the bank exclusively in this transaction; that so far as the bank's dealing was concerned, it was carried on entirely by Hannan. Therefore, there can be no error in the statement of the court that Hannan's knowledge was the bank's knowledge.

In discussing the eleventh assignment of error, counsel for the plaintiff in error repeat the argument theretofore made upon the sufficiency of Hannan's testimony to justify the court to submit the case to a jury. We think we have already thoroughly covered that question, but again submit:

First. That for reasons heretofore given the evidence was ample.

Second. As all the evidence is not before the court there is a conclusive presumption that there was evidence other than Hannan's which justified the court in submitting the case to a jury.

In connection with this discussion, it is pertinent to observe that on the question of the good faith of the Citizens' State Bank in the purchase of this paper, the burden of proof was upon the plaintiff to establish that the bank purchased the paper in good faith, for a valuable consideration and without notice of the fraud.

Daniel on Negotiable Instruments, Section 815, and cases cited.

We quote from Mr. Daniel:

"The principle is well established that if the maker or acceptor, who is primarily liable for payment of the instrument, or any party bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument, or, if the circumstances raise a strong suspicion of fraud or illegality, the owner must then respond by showing that he acquired it *bona fide* for value, in the usual course of business, while current, and under circumstances which create no presumption that he knew the facts which impeach its validity. This principle is obviously salutary, for the presumption is natural that an instrument so issued would be quickly transferred to another, and unless he gave value, which could be easily proved if given, it would perpetrate great injustice, and reward fraud to permit him to recover."

With the burden resting upon the plaintiff to establish the good faith of the Citizens' State Bank, and the cashier of that bank confessing on oath that he knew of the vice with which the paper was tainted, it is idle for the plaintiff to contend that there was no evidence to be submitted to a jury upon the issue of knowledge on the part of the bank.

But at this point counsel present the question that the court by this instruction places a greater burden upon the purchasers of commercial paper than there rests under the general rules announced by the Federal Courts. That suspicion or notice of facts sufficient to put a prudent man upon inquiry is not, according to the Federal authorities, sufficient to invalidate commercial paper in the hands of a purchaser for value, and that, therefore, the court in its instruction on the question of notice committed error. The instruction complained of may be found on pages 150, 151 and 152 of the record. If this instruction be error, plaintiff in error cannot avail itself thereof, as it is exactly in line with the request to instruct made by the plaintiff. In fact, the first part of the instruction is in the exact language of plaintiff's request. (See request Number 4, Record p. 146.) In making this request, it adopted the theory that in order to purge the bank and its officers of complicity with the original fraud, it was necessary that they should "*know of nothing to*

apprise them or put them upon inquiry with respect to the claim now made by the defendant that the note was given without consideration or procured by fraud.'' The court charged exactly as the plaintiff asked in that regard, and then instructed the jury the converse of that proposition, namely: That if the bank or its officers did know of facts sufficient to put them on inquiry, that fact would taint the paper in the hands of the bank. It is noticeable that the defendant's requests to charge, which the court gave, were absolutely correct in this particular. (Record pp. 152-154.) It is well established that one who procures error to be committed by the court or acquiesces in such error is estopped from claiming any advantage therefrom.

Ry. Co. v. Bank, 135 U. S. 432;

Bracken v. Ry. Co., 21 C. C. A. 307; 73 Federal 347;

Harper v. Moss, 114 Missouri 317; 21 Southwestern 517;

Snyder v. Snyder, 142 Illinois 60; 31 Northeastern 303;

Wilson v. Zook, 69 Missouri 69; 13 Southwestern 351;

Ft. Scott, etc., Co. v. Fortney, 51 Kansas 287; 32 Pacific 904;

City of Kansas v. Orr, 62 Kansas 61; 61 Pacific 397-399;

Silsby v. Car Co., 95 Michigan 204; 54 Northwestern 761.

If the court did commit error in this instruction, it was lead into that error, not by the defendant, but by the plaintiff. The instruction presented by the plaintiff clearly indicated to the court that its theory was that facts sufficient to apprise the bank or put it upon inquiry was all that was required. Certainly a party will not be allowed to trap a court into error and then use this error to his own advantage.

VIII.

Twelfth and thirteenth assignments of error. These assignments of error are based upon instructions given. No exception was taken thereto except the general exception heretofore discussed. Therefore, these instructions may be considered as not having been excepted to at all, under rules previously discussed. But in any event, the instructions are entirely correct.

The defense in this case was not that Bellinger did not furnish medicines to the corporation, or that Bellinger violated any contract with the corporation. The defense is that the defendant purchased an interest in a formula represented to be of a certain character and capable of accomplishing certain results. That, as a matter of fact, these representations were false and fraudulent, and that Moore got nothing for his note, except a fifth interest in a piece of blank paper. The evidence, includ-

ing the evidence of Bellinger himself, is overwhelming and conclusively establishes that this pretended formula never had any existence.

IX.

Fifteenth assignment of error. Counsel complains of the charge of the court as to the burden of proof. They cite no authority to sustain their contention. As we previously pointed out and sustained by an abundance of authority, the burden of proof, under the circumstances of this case, rested upon the plaintiff, so far as required it to establish the purchase of the paper in good faith, for value, and without notice of the fraud. The court committed no error in so charging.

We submit that there is no prejudicial error in the record, and that the judgment should be affirmed.

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